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Crown Act of State and Detention in Afghanistan

Jane M Rooney*

Abstract

The *Serdar Mohammed* litigation signalled a decisive change in judicial attitude towards scrutiny of extraterritorial executive action in armed conflict. The most significant indicator of a change of judicial attitude in the *Serdar Mohammed* litigation was the reinstatement of the act of state doctrine in the private law claim in tort. Act of state bars tort claims against the Crown when the Crown acts outside of its territory. The UK Supreme Court characterised act of state as a non-justiciability doctrine. The article argues that the UK Supreme Court exercised extreme deference in its adjudication of the act of state in the private law claim. This deference was then mirrored in the reasoning employed in the public law claim under the HRA, departing from international and domestic standards on detention in non-international armed conflicts.

Keywords

Act of state, Detention, Extraterritorial Application of Human Rights, Afghanistan, *Serdar Mohammed*, *Rahmatullah*

Introduction

Over the last two decades UK courts embraced the extraterritorial application of the Human Rights Act 1998 (HRA) in armed conflict. This means that the courts increasingly held the executive to account when acting outside of UK territory. Further, courts increasingly found themselves adjudicating upon and enforcing international law norms. This is significant as the UK is a dualist state and the normal state of affairs is that in order for international law to be enforceable in UK domestic law it must be incorporated through domestic legislation.¹ Although the HRA is domestic legislation that incorporates only the European Convention on Human Rights (ECHR), in its extraterritorial application in armed conflict it is an instrument through which other international law obligations are enforced. In extraterritorial armed conflict cases, UK courts acknowledged other international law norms designed to regulate armed conflict in the interpretation of the HRA including the laws of armed conflict (LOAC) and United Nations Security Council Resolutions (UNSCRs).² Another consequence of the extraterritorial application of the HRA in armed conflict was that extraterritorial prerogative powers were increasingly challenged as it was acknowledged that parliamentary legislation superseded unilateral executive decision-making.³

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¹ Customary international law is enforceable in UK domestic law without incorporation, except in cases of crimes. EU law was directly enforceable through direct effect and the ECA.

² See e.g. *Al Skeini v Ministry of Defence* [2007] UKHL 26 para 129 per Lord Brown of Eaton-Under-Haywood; *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.

³ Customary international law is generally considered justiciable in UK domestic law without further legislation as long as it is not inconsistent with an Act of Parliament or common law. See further: Patrick Capps, 'The Court as Gatekeeper: Customary International Law in English Courts' (2007) 70(3) MLR 458; *R v Margaret Jones* [2006] UKHL 13, [2007] 1 AC 136 is authority for the proposition that UK criminal law cannot be changed by customary international law.

On 17th January 2017, two judgments handed down by the UK Supreme Court - a private and a public law claim – concerning the alleged illegal detention by the UK of a suspected terrorist in Afghanistan, the *Serdar Mohammed* litigation, signalled a decisive change in judicial attitude towards scrutiny of extraterritorial executive action in armed conflict.⁴ This case was significant for the extraterritorial enforcement of the ECHR because it was the first time that the ECHR would apply to military intervention in Afghanistan.⁵ It would provide a blueprint for other Council of Europe states and the ECtHR, in deciding upon the application of the ECHR to ‘internationalised’ non-international armed conflict (NIAC)⁶ and would represent a significant expansion of extraterritorial adjudication.

It was perhaps as a result of the perceived political and international significance of this decision that the courts decided to take a remarkably more restrained approach to the public law and private law claims. The most significant indicator of a change of judicial attitude in the *Serdar Mohammed* litigation was the reinstatement of the act of state doctrine in the private law claim in tort: an elusive prerogative power, the parameters of which remain vague, and had only been successfully invoked in the Privy Council during the 20th century until the present litigation when it was successfully used as a defence to a claim in tort.⁷ Broadly, act of state bars tort claims against the crown when the crown acts outside of its territory. It presented itself, *obiter dicta*, in *Al Jeddah v Ministry of Defence* (No 2) in 2010 but was fully utilised and reinstated in the present litigation.⁸ The act of state doctrine, although confined to the private law claim, underpins a radically more deferential approach by the courts to extraterritorial claims arising from armed conflict. Further, while act of state was reinvigorated with life in both the High Court and Court of Appeal *Serdar Mohammed* litigation, and successfully invoked in the High Court, the Supreme Court’s conceptualisation and characterisation of act of state signalled a deference to the executive that was uncharacteristic of the trend towards acceptance of scrutiny of extraterritorial executive action in armed conflict under the HRA. While all three courts accept that act of state can be a defence in tort or a principle of non-justiciability, the High Court and Court of Appeal concluded that arbitrary and unlawful detention was a justiciable issue, while a majority in the Supreme Court decided it was not. The High Court and Court of Appeal decisions treated act of state as a defence in tort, whereas the majority of justices on the Supreme Court treated it as a non-justiciable issue.

The article argues that the majority of the Supreme Court characterised act of state as a principle of non-justiciability. It then posits four criticisms against the characterisation of act of state as a non-justiciability rule. First, act of state as a non-justiciability doctrine is an anachronistic principle that originated in colonialist practices of despotic rule and has no place in contemporary governance. Second, act of state as a principle of non-justiciability falls far below the standard of ‘high policy’ decisions accepted as non-justiciable in contemporary discourse. The day-to-day administration of detention policies falls outside normal ambit of ‘high policy’. Third, the judges

⁴ *Mohammed v Ministry of Defence* [2017] UKSC 1 (Mohammed I); *Mohammed v Ministry of Defence* [2017] UKSC 2 (Mohammed II). The *Serdar Mohammed* litigation is listed under these citations on the Supreme Court website. Both cases involved joint appeals involving detention practices in Iraq: *Rahmatullah (No 2) and Mohammed v Ministry of Defence* [2017] UKSC 1; *Abd Ali Hameed Al-Wabed and Mohammed v Ministry of Defence* [2017] UKSC 1.

⁵ But note: *The Queen (on the application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin), 2010 WL 2516377. This case was brought by Maya Evans, not under the HRA but for judicial review in the public interest. It concerned the transfer by British armed forces of Afghan terror suspects to the Afghan National Directorate of Security (NDS) where they were subjected to degrading and inhuman treatment. The High Court banned detainee transfers to this particular NDS facility.

⁶ For one of the most comprehensive accounts of the internationalisation of a NIAC and the ensuing legal challenges see Kubo Macak, *Internationalized Armed Conflicts in International Law* (OUP 2018).

⁷ One of the most comprehensive contemporary accounts of act of state is provided by Amanda Perreau-Saussine, ‘British Acts of State in English Courts’ (2008) 78(1) *British Yearbook of International Law* 176. *Yunus Rahmatullah v Ministry of Defence* [2014] EWHC 3846 (QB) soon followed the Mohammed High Court decision and was considered jointly with Mohammed in the Supreme Court private law claim (*Mohammed I*).

⁸ *Al Jeddah v Ministry of Defence* [2010] EWCA Civ 758.

only review public law non-justiciability cases despite the fact that this is a private law claim in tort and there is a distinct body of case law on non-justiciability in this area of law which points to detention being justiciable. Fourth, there is a disparity of treatment by the courts of the prerogative. The courts are much more willing to review prerogatives concerning domestic affairs - even if they are *prima facie* matters falling within 'high policy' subject matter - than they are willing to review prerogatives which effect extraterritorial individuals - even if the latter concerns a traditionally justiciable subject matter. The article then argues that the extreme deference exercised in the act of state private law decision was reflected in the judge's adjudication of the human rights issue in the public law judgment, representing a change in judicial attitude toward a more deferential approach to the executive, and less willingness to engage in extraterritorial scrutiny. An analysis of the competing international and domestic law norms is conducted to argue that the judges departed from accepted and agreed upon standards of international and domestic law with the instrumental purpose of ensuring some consistency between the private and public law adjudication.

The principle developed in the public law decision has implications for the enforcement of international law in UK domestic law. The HRA has become a gateway through which international obligations beyond the ECHR are enforceable. The High Court and Court of Appeal *Serdar Mohammed* judgments are illustrative of the employment of international law in the interpretation of human rights in armed conflict. The act of state doctrine in the private law judgment, as part of its deference towards the executive inculcates the prioritisation of domestic constitutional law principles over more outward looking, international perspective. Act of state thus sets the tone of a domestic-oriented approach to extraterritorial cases, which is carried through to the public law judgment by deprioritising an analysis of international law regulating the situation.

The Supreme Court Decision on Crown Act of State

Serdar Mohammed was detained for 110 days without charge and access to a court to determine legality of detention from April-July 2010 in Afghanistan by UK forces. The applicant alleged that his detention did not conform with law and policy under the International Security Assistance Force (ISAF) Standard Operating Procedure (SOP) 362 which permitted detention for up to 96 hours before the detainee had to be transferred to Afghan authorities with limited exceptions to this rule (including if a delay arose because of an inability to transfer the prisoner). Further it was alleged that this was not in conformity with Afghan domestic law which permitted detention for up to 72 hours, article 5 ECHR which prohibits internment in NIACs absent a derogation, and customary international law on detention in NIACs.

Initially, the Ministry of Defence argued that act of state was a bar to a private and public law claim.⁹ Justice Leggatt in the High Court found that the doctrine of Crown act of state does not operate in the field of public law but only operates in the field of tort law.¹⁰ This was accepted by the Court of Appeal and the Supreme Court.¹¹ Both the High Court and Court of Appeal characterised act of state as a defence in tort and not a rule of non-justiciability because it was justiciable under the HRA. However, the High Court ruled that the act of state could be a defence in the present litigation whereas the Court of Appeal was not convinced that it was in the public interest to allow the act of state to operate as a bar on the claim in the present litigation.

When the case arrived at the Supreme Court, act of state as a rule of non-justiciability or a defence to a claim in tort, was only considered in relation to the breach of Afghan tort law. The Supreme Court unanimously agreed that act of state could be successfully invoked. The judges were split

⁹ *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) para 409.

¹⁰ *Ibid* para 379.

¹¹ *Serdar Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843 (*Mohammed CA*); *Mohammed II* (n 4) para 14 per Lady Hale.

on whether act of state should be characterised as a defence in tort or a principle of non-justiciability but regardless of characterisation ultimately agreed with the definition put forward by Lady Hale. Acts of state are ‘sovereign acts...the sorts of things that governments properly do; committed abroad; in the conduct of the foreign policy of the state; so closely connected to that policy to be necessary in pursuing it; and at least extending to the conduct of military operations which are themselves lawful in international law (which is not the same as saying that the acts themselves are necessarily authorised in international law)’.¹² The latter phrase means that in order to invoke act of state as a bar to an extraterritorial tort claim, the military intervention and British presence in Afghanistan must be legal but the act which is under judicial scrutiny (e.g. detention of an individual) can be otherwise illegal under international law for the defence of act of state to be invoked. Act of state cannot operate as a bar to an action regarding allegations of torture, maltreatment of prisoners or detainees,¹³ but can apply in cases of expropriation and destruction of property,¹⁴ killings, and detention.¹⁵ Act of state could be used as a defence against both nationals and non-nationals extraterritorially.¹⁶

Although the crown act of state applies solely in the private law claim and not in the public law claim there is a divergence of opinion across the Supreme Court as to whether there is any legal authority for the proposition that act of state operates as a defence in tort. Lord Mance characterises act of state as a rule of non-justiciability finding no authority for act of state as a defence in tort. He purports to agree with Lord Sumption’s definition but Lord Sumption adopts Lady Hale’s definition, which is framed as a defence in tort.¹⁷ Lady Hale, with whom Lords Wilson and Hughes agreed, accepts there are two conceptions of act of state, non-justiciability and a defence to a tort claim. For her, act of state as a non-justiciability rule does not extend to the subject matter of the current case: detention practices in the course of UK military operations. Instead, act of state as a defence in tort is successfully invoked. Lord Mance, with whom Lords Hughes agrees, finds that Crown act of state is only a non-justiciability rule (and not a defence to a tort claim) and that the present private law action is non-justiciable.¹⁸ Lord Sumption finds that act of state is a non-justiciability rule and tort defence but that the rules ‘merge into one’ principle of non-justiciability.¹⁹ Lord Clarke agrees with Lord Sumption.²⁰ Lord Neuberger, with whom Lord Hughes agrees, declines to describe crown act of state as a principle of non-justiciability, and implies that there is limited authority for the proposition that it is a defence in tort. He encourages ‘caution’ in its contemporary use, but recognises its existence and agrees with the definition put forward by Lady Hale.²¹ All judges are in favour of the contemporary relevance and application of act of state in the context described by Lady Hale.

However, the divergence of opinion on what principles and precedent this is founded upon calls into question the legitimacy of the ruling. The most convincing arguments made on both sides are those made against characterising act of state as a defence in tort or a rule of non-justiciability. Lord Hughes ignores the disparity and agrees with every judge. Leaving him aside, two judges read act of state as operating as a defence in tort (Hale and Wilson), three judges ultimately characterise it as a principle of non-justiciability (Mance, Sumption and Clarke), and Lord Neuberger concedes

¹² *Mohammed I* (n 4) para 37 per Lady Hale. Lords Wilson and Hughes agree. Lord Sumption (para 81) and Mance (para 72) agree with Lady Hale but they omit the phrase about the lawfulness of the military intervention being a condition and an act can be designated as an act of state before or after the event has taken place.

¹³ *Ibid* para 36 per Lady Hale.

¹⁴ *Ibid* para 36 per Lady Hale; para 96 per Lord Sumption.

¹⁵ *Ibid* para 32 per Lady Hale; para 88 per Lord Sumption.

¹⁶ *Ibid* para 29, 37 per Lady Hale.

¹⁷ *Ibid* para 36 per Lady Hale; paras 88-93 per Lord Sumption 88-93; paras 56-58 per Lord Mance.

¹⁸ *Ibid* para 101 per Lord Mance.

¹⁹ *Ibid* para 81 per Lord Sumption.

²⁰ *Ibid* paras 107-109 per Lord Clarke.

²¹ *Ibid* para 102 per Lord Neuberger.

his discomfort in characterising it as either. Moving forward, the act of state doctrine will be a successful defence to an extraterritorial private law claim in the circumstances outlined by Lady Hale and, based on a 3-2 majority, treated as a principle of non-justiciability. While the act of state as a defence in tort was the predominant focus of the litigation running up to the Supreme Court decision and has been examined in depth elsewhere,²² this article considers the negative implications of framing act of state as a principle of non-justiciability in the *Serdar Mohammed* case.

The majority of Supreme Court judges accept a non-justiciability reading of crown act of state. Lord Mance, with whom Lord Hughes agrees, clarifies that it is a principle of abstention: the domestic court's stance should not be out of line with that of its own state in its international relations²³ and that actions involving foreign states and their citizens may be more appropriately pursued at a state-to-state level rather than through domestic courts.²⁴ The Court of Appeal understands the purpose of act of state as ensuring that the executive and judiciary 'speak with the same voice' in matters concerning the conduct of foreign relations.²⁵ However, the Court of Appeal notes that the 'speak with one voice' principle should only apply in private law claims when it is the same for public law claims. But there is no such bar in public law claims on this issue.²⁶ Lord Sumption argues that the crown act of state has nothing to do with subject matter, but with the distinction between domestic rights and international rights. The latter are non-justiciable in domestic courts.²⁷ Lord Mance disagrees with Lord Sumption stating that domestic courts are able to adjudicate upon and give effect to international law, the prime example being that customary international law is justiciable in domestic law.²⁸ They both agree that a non-justiciable act of state is one that: must involve an exercise of sovereign power, inherently governmental in nature; done outside the UK; with the prior authority or subsequent ratification of the crown; and in the conduct of the crown's relations with other states or their subjects.²⁹ It must be a necessary consequence of a decision made by the Crown through its ministers.³⁰ The act of state can extend to relatively low level decisions.³¹ For Lord Mance, *Serdar Mohammed*'s case was non-justiciable because the UK's actions 'were steps taken pursuant to or in implementation of a deliberately formed policy against persons...reasonably suspected to be insurgents or terrorists in the context and furtherance of foreign military operations during a time of armed conflict'.³² For Lord Sumption, the acts of state 'were authorised by the UK's detention policy or required by the UK's agreements with the US' and as such were 'inherently governmental', and 'authorised by the Crown'.³³

Four criticisms can be levelled against characterising act of state as a principle of non-justiciability. First, act of state as a non-justiciability doctrine is an anachronistic principle that originated in colonialist practices of despotic rule and has no place in contemporary governance. Second, act of state as a principle of non-justiciability falls far below the standard of 'high policy' decisions accepted as non-justiciable in contemporary discourse. The day-to-day administration of detention policies falls outside normal ambit of 'high policy'. Third, the judges only review public law non-justiciability cases despite the fact that this is a private law claim in tort and there is a distinct body of case law on non-justiciability in this area of law which points to detention being justiciable.

²² Paul Scott, 'The Vanishing law of Crown act of state' (2015) 66(4) NILQ 367; Perreau-Saussine (n 12) 218-245.

²³ *Mohammed I* (n 4) paras 51, 54 per Lord Mance.

²⁴ *Ibid* para 57 per Lord Mance.

²⁵ *Mohammed CA* (n 11) 353.

²⁶ *Ibid* paras 354-5.

²⁷ *Ibid* para 79-80 per Lord Sumption.

²⁸ *Ibid* para 58 per Lord Mance citing *Keyu v Secretary of State for Foreign Affairs* [2015] 3 WLR 1665 paras 117-122, 144-151.

²⁹ *Ibid* para 72 per Lord Mance following Lord Sumption at para 81 who takes his lead from Lady Hale para 37.

³⁰ *Ibid* para 92 per Lord Sumption.

³¹ *Ibid* para 91 per Lord Sumption.

³² *Ibid* para 75 per Lord Mance.

³³ *Ibid* para 95 per Lord Sumption.

Fourth, there is a disparity of treatment by the courts of the prerogative. The courts are much more willing to review prerogatives concerning domestic affairs - even if they are *prima facie* matters falling within 'high policy' subject matter - than they are willing to review prerogatives which effect extraterritorial individuals - even if the latter concerns a traditionally justiciable subject matter.

Act of State as a Doctrine of Non-justiciability

Act of state as anachronistic

First, the judges misrepresent the authorities on act of state. Act of state as a non-justiciability doctrine is an anachronistic principle that originated in colonialist practices of despotic rule and has no place in contemporary governance.³⁴ The definition of act of state arrived at by the judges is not grounded in any judicial authority and does not provide a true representation of its operation.

Act of state is originally invoked as a device to bar claims against a commercial company, the East India Company, with whom the British state has a *sui generis* relationship, to operate as an aggressive colonial power in India.³⁵ At its height, the East India Company had a private army of 200,000 men supported and funded by the British Parliament with the prime purpose of satisfying its shareholders by acquiring property: 'it was not the British government that began seizing great chunks of India in the mid-eighteenth century, but a dangerously unregulated private company headquartered in one small office...in London, and managed in India by a violent, utterly ruthless and intermittently mentally unstable corporate predator ...'.³⁶ The act of state is then invoked to condone similar practices conducted by Governors appointed to colonies.

Lord Mance and Lord Sumption identify *Secretary of State in Council of India v Kamachee Boye Sahaba*³⁷ as the main authority for a non-justiciable act of state doctrine.³⁸ *Kamachee* concerned a case where the East India Company, seized the Raj of Tanjore, and the public and private property of the deceased Rajah of Tanjore, in the absence of an heir. His widow brought a claim against seizure of the private property. However, the actions of the East India Company were not considered within the jurisdiction of a court to consider. It was decided that '[a]n act done by an agent of the Government, *though in excess of his authority*, being ratified and adopted by the Government, held to be equivalent to previous authority'.³⁹ Lord Kingsdown delivering the judgment of the Privy Council found that: '... the property now claimed by the respondent has been seized by the British Government, acting as a Sovereign power, through its delegate the East India Company; and that the act so done, with its consequences, is an act of state over which the [Court] has no jurisdiction'.⁴⁰ Much criticism was levelled against invoking act of state doctrine developed in *Kamachee*. Perreau Saussine finds that 'In *Kamachee*, the Crown was held to have successfully delegated to the East India Company a non-justiciable "sovereign" power to act despotically'.⁴¹ Bethell AG in *Kamachee* stated that the conduct of the East India Company was 'a most violent and unjustifiable measure'.⁴²

Crown action overseas is treated as non-justiciable because the imperial expansions involved were acts of 'arbitrary power' which were not performed 'under colour of legal title'.⁴³ Precisely because the Privy Council was unable to find 'any ground of legal right' for a seizure the company's actions

³⁴ Perreau-Saussine (n 7) 194.

³⁵ Ibid.

³⁶ William Dalrymple, *The Anarchy: The Relentless Rise of the East India Company* (Bloomsbury 2019) Xxv

³⁷ *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moore PCC 22 (15ER 9).

³⁸ *Mohammed I* (n 4) para 61 per Lord Mance; para 85 per Lord Sumption.

³⁹ *Kamachee* (n 37) 476.

⁴⁰ Ibid 540.

⁴¹ Perreau-Saussine (n 7) 194.

⁴² *Kamachee* (n 37) 78-79.

⁴³ F A Mann, *Foreign affairs in English courts* (Clarendon Press: Oxford, 1986) 184.

had to be understood as non-justiciable acts of state.⁴⁴ Justice Leggatt in the High Court concluded that the doctrine in *Kamachee* was “perverse” as “the executive can be held to account if it purports to act legally, but not if it openly flouts the law.”⁴⁵ Lord Mance fails to acknowledge explicitly that illegality is a criteria for invocation of act of state but in discussing the present litigation and other extraterritorial decisions concedes that the non-justiciability doctrine will operate where there are clear rules pronouncing on the legality of an act: ‘What the Supreme Court’s recent decisions emphasizes is that the doctrine is not confined to situations in which it can be said that there are no judicial or manageable standards’.⁴⁶

The cases cited by Lord Sumption in support of the proposition that *Kamachee* is established authority for a rule of non-justiciability in low level extraterritorial detention decisions are either Privy Council cases particular to the colonialist context and concern annexation of property⁴⁷ or are weak authority because they are unsuccessful invocations of act of state in the 20th century.⁴⁸ Lord Sumption’s list fails to mention the invocation of *Kamachee* to detain without legal authority in the colonial context. The application of *Kamachee* to detention cases in the process of annexation of territory in the 19th century reveals an open contempt for foreign victims of fundamental rights violations that would not be acceptable in contemporary decision-making.

In the Privy Council case, *Cook v Sprigg*, the appellants sought to enforce rights they claimed had been granted to them in concessions made by Sigcau prior to British annexation. The Privy Council, invoking *Kamachee*, found that ‘taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of state’ and therefore could not be questioned in a court of law.⁴⁹ *Cook v Sprigg* resurfaced in the Court of Appeal, *The King v The Earl of Crew ex p Sekgome*.⁵⁰ The governor was entitled to detain Sekgome either because he was empowered to act and legislate under the Foreign Jurisdiction Act 1890 (FJA) or because it was an act of state. The FJA declared the Crown’s actions in foreign dominions to be ‘as valid and effectual as though the same had been done according to the local law then in force within such Country or Place’. The ruling left the High Commissioner legally unaccountable.⁵¹ Vaughan Williams LJ provided that the decision was ‘made less difficult if one remembers that the Protectorate is over a country in which a few dominant civilised men have to control a great multitude of the semi-barbarous’.⁵² If the argument about the statutory powers of the Commissioner was ungrounded, Sekgome’s detention ‘would be justified as an act of state’.⁵³ Lord Kennedy found that detention was an act of state, justifying the detention of Sekgome.⁵⁴ You cannot usually have legislation directed against a particular person, but here the court had not ‘the case of a civilised and orderly state, such as modern England or the Rome of Cicero’s time, but the administration of a barbarous or, at least, semi-barbarous community’.⁵⁵

⁴⁴ Perreau-Saussine (n 7) 194

⁴⁵ *Mohammed HC* (n 9) para 86 per Justice Leggatt.

⁴⁶ Lord Mance, ‘International Law in the UK Supreme Court’ (King’s College, London, 13 February 2017) available at <https://www.supremecourt.uk/docs/speech-170213.pdf> (last accessed 23rd January 2020).

⁴⁷ *Sirdar Baghwan Singh v Secretary of State for India* [1874] LR 2 Ind App 38, 47; *Cook v Sprigg* [1899] AC 572; *Vajesingji Joravarsingji v Secretary of State for India* [1924] LR 51 Ind App 357; *Secretary of State for India v Sardar Rustam Khan* [1941] AC 536.

⁴⁸ *Nissan v Attorney General* [1970] AC 179, 218 (Lord Morris of Borth-y-Gest), 225 (Lord Pearce), 231-232 (Lord Wilberforce), 238 (Lord Pearson); *Johnstone v Pedlar* [1921] 2 AC 262, 275 (Viscount Cave), 278-279 (Lord Atkinson), 290-291 (Lord Sumner);

⁴⁹ *Cook* (n 47) 578.

⁵⁰ *The King v The Earl of Crew ex parte Sekgome* [1910] 2 K. B. 576 (CA).

⁵¹ Perreau Saussine (n 7) 199.

⁵² *Sekgome* (n 50) 610.

⁵³ *Ibid.*

⁵⁴ *Ibid* 609, 624-5

⁵⁵ *Ibid* 627-8.

Perreau Saussine labels the *Kamachee*, *Cook*, and *Sekgome* cases as the ‘autocratic’ act of state cases because they are based upon a principle that endorses despotic rule.⁵⁶ Invoking act of state in 2017 to justify breaching Afghan law and policy agreements, on detention in favour of retrospective decisions authorised by the executive that are not compliant with policy agreements and legal authority, is retrogressive in terms of the principles of comity and fundamental rights protections abroad.

Non-Justiciability in Public Law

Second, the act of state doctrine is a principle of non-justiciability that falls far below the standard of ‘high policy’ decisions accepted as non-justiciable in contemporary discourse. The day to day administration of detention policies falls outside the normal ambit of ‘high policy’. While act of state as a principle of non-justiciability is confined to the private law action, public law jurisprudence is invoked to justify and confine this reading of the prerogative power and to distinguish it from merely a defence in tort - a conception of act of state for which judges resorting to the non-justiciability conception could not find precedent to support. This lower threshold of non-justiciability could potentially affect public law cases, especially in the absence of the HRA.

While the particular area of policy-making itself may call for a degree of judicial deference to the superior knowledge or expertise of elected branches this is not, and should not be regarded as being the same as making a topic non-justiciable in its entirety. Non-justiciability has been described as the ‘nuclear option’⁵⁷ when courts consider it beyond their competence to exercise judicial scrutiny of executive action. This is because invocation of non-justiciability does not only affect the outcome of the case before the courts, but could exclude future cases based on similar facts from judicial analysis regardless of the merits of the claim and the potential development in Strasbourg.⁵⁸ It is only in exceptional circumstances that a doctrine of non-justiciability is invoked and the use of the doctrine has been limited in the interest of constitutional legitimacy including the separation of powers principle, parliamentary democracy and the rule of law. *GCHQ* provides an authoritative list of matters that may be characterised as ‘high policy’ and beyond judicial scrutiny. In *GCHQ* the courts decided that whether or not a case was justiciable did not depend upon the source of the law: prerogative powers were justiciable. But certain issues may be non-justiciable depending upon their subject matter.⁵⁹ Lord Roskill clarified the subject matter that would not be justiciable: ‘those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of parliament and the appointment of ministers as well as others...’.⁶⁰ This is a non-exhaustive list.

However, the HRA made questions pertaining to Convention rights justiciable even in matters of ‘high policy’:⁶¹ ‘it is now common ground that if a Convention right requires the court to examine and adjudicate upon matters which were previously regarded as non-justiciable, then adjudicate we must’.⁶² ‘High policy’ decisions that may be non-justiciable include questions of international significance upon which no consensus in international law or policy has been reached. These are high level decisions of an abstract and far-reaching nature upon which there is no state consensus or upon which the UK domestic courts feel is outside of its control to pronounce upon unilaterally. One of the prime examples is in *R (Campaign for Nuclear Disarmament) v Prime Minister of the United Kingdom*⁶³ the claimants sought a declaration that it would be contrary to international law for the UK to use force against Iraq without a UNSCR authorising such action under the UN Charter.

⁵⁶ Perreau-Saussine (n 7) 202.

⁵⁷ Jeff King, ‘Institutional approaches to judicial restraint’ (2008) 28 OJLS 409, 421.

⁵⁸ Roger Masterman, *The Separation of Powers in the Contemporary Constitution* (CUP 2011) 92.

⁵⁹ *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 [1985] AC 374 (GCHQ).

⁶⁰ Ibid para 418 per Lord Roskill.

⁶¹ Masterman (n 58) 92; *Mohammed HC* (n) para 412; *Mohammed CA* (n 11) paras 346-348.

⁶² *Mohammed HC* (n 9) 415 citing *R (on the application of Gentle) v Prime Minister* [2008] UKHL 20, Lady Hale para 60.

⁶³ *R (Campaign for Nuclear Disarmament) v Prime Minister of the United Kingdom* [2002] EWHCA 2777 (Admin)

The divisional court found the case non-justiciable because it would be contrary to ‘public interest’ for it to adjudicate upon such matters.⁶⁴ The legality of the use of force against Iraq depended upon whether or not it constituted an exception to the customary international law prohibition on the use of force, and in particular whether UNSCR 1441 authorised an exception to the rule. The applicants argued that ‘the *ius cogens* prohibition on the use of force was part of the common law in the absence of any contrary legislation; that it was asking the court to determine not a factual or policy issue but a “clinical point of law”; and that to leave it within the exclusive province of the executive would be contrary to the rule of law’.⁶⁵

The court invoked the doctrine of the separation of powers to characterise the legality of the Government's decision to go to war as non-justiciable. Foreign policy and deployment of armed forces remained ‘forbidden areas’,⁶⁶ and ‘international law must often be left ‘as shades of grey and open for diplomatic negotiation’ as clear articulation of the international law position would undermine Government negotiations.⁶⁷ Perreau-Saussine notes that this reasoning conflicts with the International Court of Justice decision of *Threat or Use of Nuclear Weapons*: ‘Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed on them by international law’.⁶⁸ Simon Brown L.J. stated that ‘the common law encompasses customary international law’.⁶⁹ However, he also held that UNSCR 1441 had the status of an ‘unincorporated treaty’, and therefore constituted ‘international law in no way bearing on the application of domestic law’... there was ‘simply no foothold in domestic law for any ruling to be given on international law’.⁷⁰ Perreau-Saussine criticises this aspect of the judgment arguing that if customary international law is part of the common law, the executive must obey it as a matter of law rather than as a matter of choice.⁷¹

Justice Leggatt found that act of state as a non-justiciability rule had no application in the present case because it was within the capacity of the courts to adjudicate on detention. Lady Hale agreed:

including detention as a non-justiciable subject matter would mean expanding the meaning of non-justiciability to situations that have not been covered by that rule previously. It would not only encompass high policy decisions but also aspects of the conduct of military operations, ‘even though their subject matter was entirely suitable for determination by the court’.⁷²

The adoption of a non-justiciability conception of act of state is therefore concerning as it signals the lack of willingness to adjudicate extraterritorially on matters that are usually central to the judicial role as is indicated in the content of article 5 itself which prohibits deprivation of liberty except when a court has decided that the individual should be detained following conviction by a court⁷³ or in cases where the individual is detained in order to bring them before a competent court to decide the lawfulness of detention.⁷⁴ Furthermore, a procedural safeguard enshrined in article

⁶⁴ Ibid Lord Simon Brown para 47(ii); Lord Richards paras 55-58.

⁶⁵ Amanda Perreau-Saussine, ‘The shades of grey in the rule of international law’ (2003) 62(3) CLJ 538, 538.

⁶⁶ Kay J citing (*Abbassi*) v. *Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 par 106 per Lord Phillips M.R.

⁶⁷ R (*Campaign for Nuclear Disarmament*) (n 63) para 60 per Judge Richard.

⁶⁸ Perreau-Saussine, ‘The shades of grey in the rule of international law’ (n 65) 539 citing [1996] ICJ. Reports 226, para 13.

⁶⁹ R (*Campaign for Nuclear Disarmament*) (n 63) para 40 per Lord Simon Brown.

⁷⁰ Ibid para 36, 47 per Lord Simon Brown.

⁷¹ Ibid 540.

⁷² *Mohammed I* (n 4) para 33 Lady Hale.

⁷³ Article 5(1) (a).

⁷⁴ Article 5 (c) and (d).

5(4) is that the lawfulness of detention is contingent upon the ability to be able to have the lawfulness of the detention speedily towards the court.⁷⁵

Non-justiciability in Tort Law

Third, detention is not a non-justiciable issue in English tort law. Lords Mance and Sumption do not assess whether a doctrine of non-justiciability can bar an action in tort despite the fact that the act is justiciable under public law. They do not consider the tort position at all, only relying on public law cases to assess justiciability whilst denying that their non-justiciability doctrine extends to the public law claim. The purpose of tort law claims is not only compensation, but also deterrence and accountability. Immunity from a tort claim obstructs all of the functions of tort. This is not withstanding the fact that a parallel plea under the HRA may exist. False imprisonment is a trespass tort aiming to protect fundamental rights and challenging the legality of detention is actionable per se.⁷⁶ While recent cases may have limited the extent to which damages can be awarded in tort when the applicants cannot show any tangible harm from detention, this does not take away from the fact that tort acknowledges challenging alleged unlawful detention as actionable per se.⁷⁷

A disparity can arise between the tort law and HRA position on justiciability – they do not have to hold the same legal position, although in the interests of legal certainty and the rule of law it is beneficial for both bodies of law to align. A disparity often arises in relation to positive obligations arising under Article 2 HRA in the context of public authorities and the police failing to take active steps to protect life, especially where the police is expected to protect a person's life against a third party.⁷⁸ However, even the disparity relating to positive obligations and the right to life is closing. *Smith v Ministry of Defence* concerned a duty of care owed by the state to servicemen for failing to provide adequate equipment and training on the battlefield, leading to the death of soldiers while serving in Iraq.⁷⁹ The Supreme Court held, dismissing any precedent to the contrary, that common law tort aligned with the position under Article 2 ECHR that a positive obligation existed to protect the life of the soldiers. The interaction between tort and the HRA, between a duty of care owed/claims in negligence versus positive obligations in terms of what public authorities are expected to do to prevent harm to individuals is still contentious, mutable, and gives rise to divergence. But as a result of the HRA, the ability to use non-justiciability to block the claim has been seriously undermined.⁸⁰ Detention is different. It concerns a trespass tort, false or unlawful imprisonment, and operates to protect fundamental rights. It is always actionable per se. Under the applicable Afghan law, the imprisonment was unlawful and justiciable.

In a High Court decision that followed the *Serdar Mohammed* litigation, in *Alseran v Ministry of Defence*, Leggatt in effect rejects that a matter can be non-justiciable under the tort law claim whilst being justiciable under the HRA.⁸¹ Leggatt invokes the principle that parliament can displace and override a prerogative power with legislation and that act of state, so far as it concerns detention practices, has been overridden by the HRA. Leggatt found there was a basis of liability for the unlawful imprisonments and batteries of claimants under Iraqi law. He considered whether the crown act of state doctrine applied if the conduct and/or policy in question was unlawful as matter of English domestic law. Leggatt held that the doctrine does not apply where a particular

⁷⁵ Article 5(4).

⁷⁶ Jane Wright, *Tort Law and Human Rights* (Hart 2017) 171.

⁷⁷ *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12

⁷⁸ *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50.

⁷⁹ *Smith v Ministry of Defence* [2013] UKSC 41

⁸⁰ Wright (n 76) 4; *Jain v Trent Strategic Health Authority* [2008] QB 246 [62]: Lady Justice Arden: 'following the 1998 Act courts have now to consider questions of social policy with which they were not previously concerned...it is possible to conclude that the courts will hold that fewer matters are now non-justiciable [in negligence] on the grounds that they involve policy issues'.

⁸¹ *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB).

government policy of a kind which is judicially reviewable is unlawful in English domestic law and therefore outside the scope of the government's legal powers.⁸² Ultra vires policies and acts have no legal effect and can give rise to the Crown's liability in tort.⁸³ Being contrary to LOAC and the HRA 1998, such policies were unlawful under English domestic law and therefore ultra vires.⁸⁴ It is in practice a rejection of the position adopted by the Supreme Court. The government policy or decision must comply with English domestic law, including the HRA. The dichotomy between private and public law is eroded by Leggatt.

Grušić explains the judgment as Leggatt connecting private and public law.⁸⁵ But it is important to note that Leggatt goes further: he erodes the dichotomy between the private and public law claim so far as the question of justiciability is concerned. Grušić's explanation is the following:

It is through this process that a question of tort law and private international law (Is there a tortious claim against the crown which concerns governmental acts committed abroad?) becomes a question of domestic public law (is the government's policy in question judicially reviewable and unlawful as a matter of English domestic law and ultra vires?), which in turn becomes a question of public international law (Has the government's policy violated [LOAC] and human rights standards?).⁸⁶

Mance and Sumption did not consider the doctrine of non-justiciability in tort law and only relied upon public law cases. Their assessment was of whether the matter was justiciable under public law and therefore speaks to the claim under the HRA. Reiterating Leggatt and the Court of Appeal, a finding of non-justiciability would preclude both actions, and this would be illegitimate because it is well established that this type of detention case is justiciable under the HRA. In *Alseran*, Justice Leggatt rejects the Chinese wall created by the Supreme Court between the private and public law claim, act of state as non-justiciability running parallel with the HRA claim.

Non-justiciability: Disparity between Domestic and International Cases

Fourth, to label extraterritorial detention as a non-justiciable subject matter is to reinforce the binary between domestic and extraterritorial state action in the common law. As previously stated, the orthodox position is that non-justiciability is considered as a 'nuclear option' and 'high policy' matters that preclude judicial adjudication have a high threshold e.g. questions of international significance upon which no consensus in international law or policy has been reached. However, the courts increasingly contradict this orthodoxy along jurisdictional lines. The courts have demonstrated an increased willingness to adjudicate upon matters traditionally understood as matters of 'high policy' in the domestic sphere, while declining to adjudicate upon non-HRA, lower level matters upon which clear legal and/or policy guidelines exist in the extraterritorial domain.

This results in a disparity of treatment and perceived worth between those situated within the UK's territory as compared with those situated outside of the territory where the rights violation occurs. A binary does exist between the national and the foreigner but is not limited to that: it is a binary between those who stay and those who leave. The introduction of act of state, which creates a presumption that people affected outside UK territory will not have any legal recourse against the UK in British courts, reinforces further this dichotomy.

⁸² Ibid para 76.

⁸³ Ibid para 71.

⁸⁴ Ibid paras 327-328.

⁸⁵ Uglješa Grušić, 'Civil Claims Against the Crown in the Wake of the Iraq War: Crown act of state, limitation under foreign law and litigation funding in *Alseran v ministry of defence*' (2018) 37(4) Civil Justice Quarterly 428-442.

⁸⁶ Ibid 432.

*Miller v Secretary of State for Exiting the EU*⁸⁷ (Miller I) and *Miller v Prime Minister*⁸⁸ (Miller II) are two noteworthy cases where the Supreme Court found that the prerogatives, despite falling *prime facie* within the ‘high policy’ matters of making and leaving treaties and prorogation of parliament respectively, were nevertheless justiciable. The applicant was furthermore successful in challenging the executive action in both cases. In contrast, non-HRA extraterritorial cases⁸⁹ such as *Bancoult (No 2)*,⁹⁰ *Noor Khan*,⁹¹ *Sandiford*,⁹² demonstrate the UK courts’ unwillingness to review an extraterritorial matter/prerogative instead labelling it as ‘non-justiciable’, and if not non-justiciable, then subject to a severely limited form of review, leaving the applicant with no judicial, or alternative remedy. The courts are invoking the language of ‘rights’ in the domestic context to justify review of archetypal prerogative powers, while placing little weight on the rights of those harmed extraterritorially.

In *Bancoult (No 2)*,⁹³ the House of Lords held that the prerogative power to expel the indigenous population of the Chagos Islands was non-justiciable. The Chagos islands were a dependency of Mauritius when it was ceded to the UK by France in 1814 and until 1965 were administered as part of that colony. In 1966 the UK Government agreed to allow the US to use the largest of the Chagos Islands, Diego Garcia, as a military base. The UK therefore made the British Indian Ocean Territories Order 1965 SI No 1920 (the BIOT order) which, under the Colonial Boundaries Act 1895, detached the Chagos islands from the colony of Mauritius and constituted them a separate colony known as BIOT.⁹⁴ The order created the office of Commissioner of BIOT and conferred upon him power to ‘make laws for the peace, order and good government of the Territory’. Under these powers the Commissioner for BIOT made the Immigration Ordinance 1971. Section 4 of the Ordinance made it unlawful for a person to be in the BIOT without a permit and empowered the Commissioner to make an order directing that person’s removal. Between 1968 and 1973 the UK Government procured the removal and resettlement of the Chagossians. The UK paid some compensation for the harm suffered by the displaced Chagossians.⁹⁵ Litigation began in 1998 for the declaration that Immigration Ordinance 1971 was void which was successful and the Commissioner revoked the ordinance.⁹⁶ However, following an examination of the feasibility of resettling Chagossians to the islands, including discontent from the US, the immigration controls were reintroduced by s 9 of the Constitution Order and an Order in Council (Immigration Order) in 2004. Chagossians needed immigration consent even to visit the islands. The current litigation challenged the 2004 order.

The judgment begins by acknowledging that as BIOT was ceded to the Crown, the executive has a prerogative power to legislate for the Territory⁹⁷ and it was for the court to determine the limits of that power. Lord Hoffmann found that a prerogative Order in Council was primary legislation

⁸⁷ *Miller v Secretary of State for Exiting the EU* [2017] UKSC 5.

⁸⁸ *Miller v Prime Minister* [2019] UKSC 41.

⁸⁹ In *Khan* no claim was brought under the HRA but instead under the Serious Crimes Act 2017. In *Bancoult (No 2)* and *Sandiford* the HRA did not apply as a result of jurisdictional issues.

⁹⁰ *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61. The appeal which did not relate to the scope of the prerogative power also failed: *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 35. There is also litigation on fishing rights being pursued in UK courts: *R (on the application of Bancoult No 3) (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)* [2018] UKSC 3.

⁹¹ *R (on the application of Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24

⁹² *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697.

⁹³ *Bancoult No 2* (n 90).

⁹⁴ The inhabitants of BIOT were UK citizens and did not lose their UK citizenship when Mauritius became independent in 1968.

⁹⁵ *Bancoult No 2* (n 90) paras 11 and 13.

⁹⁶ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067

⁹⁷ *Bancoult No 2* (n 90) para 31 per Lord Hoffmann citing Halsbury’s Laws of England (4th edn 2003 reissue) vol 6, para 823.

and not subordinate⁹⁸ but was not the same as an Act of Parliament because it was not democratically accountable and was judicially reviewable on the grounds of legality, irrationality and procedural impropriety.⁹⁹ However he found the proposition that the Crown did not have power to remove an islander's right of abode in BIOT 'too extreme'.¹⁰⁰ For him, there was 'no basis for saying that the right of abode was in its nature so fundamental' that the crown could not touch it.¹⁰¹ Hoffmann rejected the argument that the powers of the Crown were limited to legislation for the 'peace, order and good government' of the Territory, and therefore for the benefit of the inhabitants.¹⁰² Where there is a conflict of interests the crown is entitled to legislate in the interests of the UK.¹⁰³ In terms of judicial review, it is not irrational to deny the right of abode on the grounds that it is uneconomic¹⁰⁴ and was not in the interest of UK security.¹⁰⁵

Lords Rodger and Carswell decided against the applicants on the grounds that the Colonial Laws Validity Act of 1865 ousted the jurisdiction of English courts to review the scope and exercise of powers of colonial government and that the order in question was an example of such a power. However, Lord Rodgers considered whether the order in council was reviewable and, although agreed with Hoffmann that prerogative orders may be reviewable per se, thought that this order in council was not justiciable insofar as considering the question of whether it was made for the 'peace, order and good government of the Territory'. Parliament would have to intervene if it felt that the power had been exercised incorrectly.¹⁰⁶ He agreed with Lord Hoffmann that the order was not irrational on economic and security grounds.¹⁰⁷ Arguments based on the legitimate expectation created by *Bancoult I* litigation were rejected.¹⁰⁸ The case testifies to the frigidity with which each branch of governance confronts its colonial past. This frigidity is a hallmark of the colonial mindset, which is operationalised through the prerogative power.

Noor Kahn concerned the targeted killing by a drone operated by the CIA of 40 people attending a peaceful council of tribal elders including the applicant's father.¹⁰⁹ The strike was facilitated by GCHQ intelligence. The claimant argued that the lack of a formulated legal policy and practice in handing over intelligence to the CIA involved requiring GCHQ officers to encourage and/or assist the commission of murder.¹¹⁰ The courts found that the case was non-justiciable because in the course of adjudicating upon the actions of the UK, it would be necessary to make a statement on the legality of action of the US. Lord Justice Laws found that 'a finding by our court that the notional UK operator of a drone bomb which caused a death was guilty of murder would inevitably be understood...by the US as a condemnation of the US... What matters is that the findings would be understood by the US authorities as critical of them'.¹¹¹ However, the implicit condemnation of another state's actions does not take away from the fact that it is the lawfulness of the UK's inaction, according to UK law, that is under scrutiny. The latter reasoning has in the past resulted in a successful action against the UK for failing to make the US return a prisoner of war from a US base in Afghanistan to a British base in Iraq to prevent against inhumane and degrading treatment.¹¹² The Joint Committee on Human Rights has since expressed grave concerns about

⁹⁸ Ibid para 34.

⁹⁹ Ibid para 35.

¹⁰⁰ Ibid para 42.

¹⁰¹ Ibid para 45.

¹⁰² Ibid paras 46-47.

¹⁰³ Ibid para 49.

¹⁰⁴ Ibid para 54.

¹⁰⁵ Ibid para 57.

¹⁰⁶ Ibid para 109 per Lord Rodgers.

¹⁰⁷ Ibid paras 112-114.

¹⁰⁸ Ibid paras 59-61 per Lord Hoffmann.

¹⁰⁹ *Khan* (n 91).

¹¹⁰ Contrary to ss 44 and 46 of 2007 Act.

¹¹¹ *Khan* (n 91) para 37.

¹¹² *Rahmatullah v Secretary of State for Defence* [2012] UKSC 48 para 70 Lord Kerr,

the transparency of procedures in UK targeted killings.¹¹³ The scale of unaccountable UK targeted killings has been raised as a matter of concern by the All Party Parliamentary Group on Drones. To find this subject matter non-justiciable on the grounds that it would mean inadvertently criticising the conduct of another state illustrates a disregard for the individuals affected.

In *Sandiford* the courts found the decision of the Secretary of State to withhold legal aid for a final appeal by a British citizen convicted of drug smuggling and sentenced to death in Indonesia reviewable because it did not raise real issues of foreign policy.¹¹⁴ But they could only review the Secretary of State's decision in accordance with their published guide. The *Support for British Nationals Abroad: a Guide 2007* provided that the UK government could not give legal advice or start legal proceedings on behalf of nationals facing capital punishment abroad. They could provide a list of local interpreters and lawyers but could not any financial assistance. The applicant sought to challenge the blanket nature of the policy. The courts did not find this policy irrational.¹¹⁵ There was a financial justification for not providing funding because there were a number of death penalty cases arising. Despite refusing to criticise the blanket ban on funding, Lords Carnwath and Mance stated that 'logic and consistency call for an urgent review of the policy as it applies to Sandford'.¹¹⁶ The mitigating factors in her case included her age (she was 57), she had mental problems, she had no previous record, she had cooperated with the police to bring to justice members of the drug syndicate, the sentence was disproportionate, and the fees for the lawyer were relatively cheap.¹¹⁷ Further, 'under the pre-2007 policy, the Foreign Office did not experience real difficulty in controlling and limiting the financial exposure which it incurred in a few exceptional cases'.¹¹⁸ This case was 'extreme' in terms of the injustice that would accrue as a result of the lack of funding. But this appraisal did not affect the outcome which was to not award financial help to *Sandiford*.

Cases that do not fall within the jurisdiction of the HRA and concern executive exercise of the prerogative abroad illustrate the deference of the courts towards the executive. Even when fundamental rights are at stake such as the right to life – the right not to be assassinated, the right not to be subjected to the death penalty – and the right to believe to return to your home.¹¹⁹ The re-emergence of act of state in the 21st century in cases falling under the HRA, with an unforeseen potential as an enabler of unchecked executive action, signals a lack of empathy for the extraterritorial individual that is reminiscent of the colonial mindset.

Deference in the Public Law Claim: Act of state and the Decline of International law adjudication

Reinstatement of act of state marks a departure from the increasingly expansive approach adopted by the UK courts to extraterritorial human rights adjudication. While act of state is confined to the private law claim, and not a ban on an extraterritorial action under the HRA, the public law case accompanying the private law case, both handed down on the same day and both pertaining to the case of *Serdar Mohammed*, demonstrates a change in judicial attitude towards the extraterritorial application of human rights in armed conflict. The courts are less willing to question the extraterritorial actions of the executive even when no clear legal authority exists for their action

¹¹³ Joint Committee on Human Rights, 'Government's policy on use of drones for targeted killing' May 2016 available at <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/57402.htm> last accessed 23rd January 2020.

¹¹⁴ *Sandiford* (n 92) para 65.

¹¹⁵ *Ibid* para 66.

¹¹⁶ *Ibid* para 74.

¹¹⁷ *Ibid* para 75.

¹¹⁸ *Ibid*.

¹¹⁹ See e.g. *Loizidou v Turkey (preliminary objections)* (1996) 23 EHRR 513, (1997) 23 EHRR 513, (1998) 26 EHRR CD 5, HRCDD 732

or arguably when the law expressly prohibits the action. The judgment also reveals a lack of willingness by the court to enforce or clarify international law obligations through the HRA.

Prior to the Supreme Court's *Serdar Mohammed* judgments, UK courts adopted an increasingly expansive approach to the extraterritorial application of human rights. In 2013, in *Smith v Ministry of Defence*, the Supreme Court confirmed that the HRA extended to securing the protection of the right to life, under article 2 ECHR, to members of the armed forces when they were serving outside its territory in a case where British soldiers alleged they were killed in Iraq as a result of inadequate equipment.¹²⁰ This resulted in a successful claim in negligence against the state. The Supreme Court accepted the test of extraterritoriality adopted by the ECtHR in *Al Skeini v UK* of 'state agent authority and control' which enabled the jurisdiction of the ECHR to be triggered when one state agent breached the rights of another individual.¹²¹ However, the Supreme Court went further than the ECtHR in extraterritorial accountability insofar as it was the first case in which armed forces of a Member State claimed extraterritorial rights under the ECHR, and the court imposed on the state positive obligations to protect the right to life extraterritorially. This was not a matter of merely questioning the legality of a particular use of force or requiring an investigation to be carried out into the death.¹²²

*Al-Saadoon & Ors v Secretary of State for Defence*¹²³ concerned a number of claims relating to British military involvement in Iraq between 2003 and 2009, including ill-treatment, unlawful detention, and unlawful killing of Iraqi civilians. The High Court found that the HRA could extend to situations where control was exercised through the use of physical force alone.¹²⁴ The Court of Appeal applied a more limited approach but with the same outcome: that ECHR accountability extended to unlawful killing. However, in order for jurisdiction to be established the applicant had to demonstrate 'a greater degree of power and control than that represented by the use of lethal force . . . alone'¹²⁵ for example being a detainee or because some of the public powers were exercised by the Member State in Iraq e.g. maintaining peace and security. The fact that the HRA was applicable in a case where someone was killed by UK armed forces in an overseas military intervention represented an expansive approach to extraterritoriality.

Serdar Mohammed was the first time that the ECHR would apply to military intervention in Afghanistan. It would provide a blueprint for other Council of Europe states and the ECtHR, in deciding upon the application of the ECHR to 'internationalised' non-international armed conflict (NIAC) and would represent a significant expansion of extraterritorial adjudication. An 'internationalised' NIAC is widely used to denote multinational military interventions taking place in one state's territory between multiple state and non-state actors. It is distinguished from a NIAC because of the involvement of international states, and it is differentiated from an international armed conflict (IAC) because of the involvement of non-state actors and the centralisation of conflict in one territory. While traditionally only human rights regulated detention in NIACs, and LOAC regulated detention in an IAC, whether or not the more permissive LOAC regime should regulate detention in an 'internationalised' NIAC remained (and remains) a controversial question. The ECHR only permits detention on seven exhaustive grounds.¹²⁶ Internment was not permitted

¹²⁰ *Smith* (n 79).

¹²¹ This was a departure from the House of Lords decision: *R. (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26 where the courts decided that the ECHR would apply extraterritorially only when the Member State exercised 'effective control' over the territory and was in a position to ensure the full range of ECHR protection following *Banković v Belgium* (2007) 44 EHRR SE5.

¹²² See e.g. *Al Skeini v UK* (2011) 53 EHRR 18; *Jaloud v Netherlands* [2014] ECHR 1403.

¹²³ *Al-Saadoon and Ors v Secretary of State for Defence* [2016] EWCA Civ 811.

¹²⁴ *Al-Saadoon and Ors v Secretary of State for Defence*, [2015] EWHC 715 (Admin) at para. 95

¹²⁵ *Al Saadoon CA* (n 123) para 69.

¹²⁶ 'Guide on Article 5 of the Convention – Right to liberty and security' (European Court of Human Rights, Updated 31st December 2019) 11 paras 25-26. But note comments on international armed conflict at 11 para 27: 'As

in the absence of a derogation.¹²⁷ But in light of the exigencies of NIACs many argue that it should be allowed as long as there is a legal basis for it and the proper procedural safeguards are in place.¹²⁸ Among those who take this position, it is a contentious question as to whether LOAC can be a legal basis for detention in NIACs.¹²⁹ The main question which the UK courts had to consider in the public law claim under the HRA was whether they should apply human rights standards to the exclusion of LOAC in detention in Afghanistan and prohibit detention that did not fall within any of the exceptions listed in Article 5. In different ways, all of the courts were reluctant to find that human rights could not accommodate – at least partially – the detention of Serdar Mohammed, and the Court of Appeal and Supreme Court were reluctant to rely on human rights standards, instead focusing on LOAC and UNSCRs respectively. But the Supreme Court’s approach was significant in the extent of the deference it demonstrated to the executive.

Also in question were more abstract questions such as the extent to which domestic courts could contribute to the development of international law in this unclear area of law, and the point at which domestic court decisions could become a source of international law. If the courts were to resolve not to interpret the HRA through the lens of LOAC in a NIAC, and instead prohibit internment, they would be applying the status quo rather than contributing to the development of international law. But commentators believed that at least to a certain extent, and with all procedural safeguards in place, internment should be permitted in the more complex forms of NIACs. The main question was whether human rights standards (prohibition on internment) should apply to the exclusion of LOAC (circumstances in which internment is permitted) in detention cases in Afghanistan.

The High Court and Court of Appeal in *Serdar Mohammed* found a violation of article 5 ECHR in the case of an Afghan detained by the UK for longer than 96 hours. The High Court and Court of Appeal reached this decision primarily by engaging in an adjudication of the human rights and potential LOAC rights for determining the outcome. The Supreme Court arrived at the decision that indefinite internment could potentially be permitted under a UNSCR that stated that Member States were authorised to do whatever was ‘necessary for imperative reasons of security’.

The Supreme Court decision creates worrying precedent. First, the majority found that the relevant UNSCRs could potentially authorise detention in Afghanistan indefinitely using the wording that the Member States were authorised to do what was ‘necessary for imperative reasons of security’. Although UNSCRs are a source of international law,¹³⁰ the Supreme Court has in effect rejected substantive international law in favour of wide reaching and ill-defined powers accorded to states by the Security Council. Contrary to the High Court and Court of Appeal, the Supreme Court concluded *obiter dicta* that there was a right to detain under LOAC treaty and customary law in NIACs, but ultimately did not rely on the essential question of the relationship between these two significant bodies of international law, LOAC and human rights. Instead they pointed to UNSCRs to condone the decisions of the executive. The Supreme Court then decided that article 5 ECHR could accommodate exceptional grounds of detention when authorised by UNSCRs.

regards detention taking place during an international armed conflict, the safeguards under Article 5 must be interpreted and applied taking into account the context and the provisions of international humanitarian law’ citing *Hassan v UK* App no 29750/09 (ECtHR, 16th September 2014).

¹²⁷ Ibid. See e.g. Gentian Zyberi and Anna Andersson, *The ‘Legal Pluriverse’ Surrounding Multinational Military Operations* (OUP 2020) 148;

¹²⁸ See e.g. Lawrence Hill-Hawthorne, *Detention in Non-International Armed Conflict* (OUP 2016).

¹²⁹ See generally the discussion on *EJIL:talk!* which provides a variety of positions on this matter. A good starting point is here: Lawrence Hill-Cawthorne and Dapo Akande, ‘Locating the Legal Basis for Detention in Non-International Armed Conflicts: A Rejoinder to Aurel Sari’ available at <<https://www.ejiltalk.org/locating-the-legal-basis-for-detention-in-non-international-armed-conflicts-a-rejoinder-to-aurel-sari/>> last accessed 23rd January 2020.

¹³⁰ See e.g. Stefan Talmon, ‘The Security Council as World Legislature’ (2005) 99(1) AJIL 175.

The case: Human Rights, LOAC and UNSCRs

Serdar Mohammed was detained for 110 days from April-July 2010. The states taking part in the ISAF had agreed upon detention for up to 96 hours in SOP 362 before the detainee had to be transferred to Afghan authorities with limited exceptions to this rule (including if a delay arose because of an inability to transfer the prisoner). Afghan domestic law permitted detention for up to 72 hours. Justice Leggatt in the High Court had split the period of detention into three different timeframes. The first timeframe consisted of the first 96 hours of detention (ISAF policy deadline before detainee had to be transferred to Afghan authorities). Justice Leggatt argued that he was bound by the *Al Jeddah* House of Lords decision wherein it was stated that where a UNSCR and human rights conflict, the UNSCR trumps the human right, and that the UNSCR constituted a binding obligation.¹³¹ Leggatt then accepted that the UNSCR gave authorization to detain but not outside the ISAF policy (96 hours) or the Afghan criminal justice system (72 hours).¹³²

However, he found the requirements of the ISAF policy were compliant with the exception to prohibition against deprivation of liberty under article 5(1)(c) ECHR - detention 'for the purpose of bringing him before an Afghan prosecutor or judge' and that it cannot have been a coincidence that the four day limit used by ISAF was compliant with ECtHR jurisprudence on this matter.¹³³ In conclusion, 'the applicable UNSCR authorized detention by UK armed forces participating in ISAF only for such time as was necessary to deliver the detained person to Afghan authorities, and ISAF's policy was within the scope of this authorisation'.¹³⁴ Justice Leggatt found that the 'applicable UNSCRs conferred on UK armed forces participating in ISAF authority to detain people where this was considered necessary to fulfil ISAF's mandate'.¹³⁵

The second timeframe was from 11 April – 4 May 2010 during which time *Serdar Mohammed* was held for intelligence purposes and the third period was when *Serdar Mohammed* was waiting to be transferred to Afghan authorities from 4 May – 25 July. Justice Leggatt applied human rights standards to conclude that detention for intelligence purposes was illegal. For the remainder of detention he was held in custody 'on the decision of Ministers and officials without being brought before a judge, and without being given any opportunity to challenge the lawfulness of his detention' and did not fall within any of the exceptional grounds under article 5.¹³⁶ In terms of the application of LOAC, he found that even though it was possible for LOAC to be used in the interpretation of human rights if a state derogated from the pure application of human rights he was not convinced that LOAC could 'provide a legal basis for detention in situations of non-international armed conflict'.¹³⁷

The government appealed the decisions on the second and third period. Since the High Court decision, the ECtHR had handed down *Hassan v UK* which was significant insofar as it confirmed that states did not have to derogate from the ECHR in order to interpret human rights, and in particular article 5, through the lens of LOAC thereby allowing detention without charge in specified circumstances.¹³⁸ This constituted an exception to what had previously been construed as an exhaustive list of grounds of detention. The judgment strictly concerned IACs and not NIACs. The Court of Appeal accepted that human rights standards could be interpreted through the lens of LOAC without a derogation. But it reasoned that *Hassan* could be extended to the

¹³¹ *Mohammed HC* (n 9) para 211.

¹³² *Ibid* 219.

¹³³ *Ibid* paras 323-324, citing *Brogan v UK* 1988 Ser. A, No. 145-B, 11 EHRR 117 para 47.

¹³⁴ *Ibid* para 331.

¹³⁵ *Ibid* paras 227, 418.

¹³⁶ *Ibid* paras 335-337.

¹³⁷ *Ibid* paras 288-294.

¹³⁸ *Hassan* (n 126).

present case only if it could be confirmed that LOAC provided a legal basis for detention in NIACs thereby accepting the *prima facie* position that the detention was illegal on the face of the HRA. The Court of Appeal could not find a legal basis for the detention beyond 96 hours in the UNSCRs, Afghan law, or LOAC, despite the very detailed consideration of both treaty and customary law when considering the latter. Therefore, under the HRA, the detention was illegal. The Court of Appeal could also not point to any English legislation that allowed for a detention policy that departed from the other legal frameworks, and intimated that this may have been enough to make the detention non-arbitrary. The Court of Appeal, unlike Justice Leggatt, found that act of state was not applicable in the present case and that the claimants were eligible for a remedy in tort.

The Supreme Court decision takes a different turn. The majority in *Serdar Mohammed* found that there was a breach of article 5 insofar as he was detained for intelligence purposes from 11 April – 4 May 2010. However, of that majority, many agreed that if it could be argued that the detainee was held for a simultaneous purpose, for ‘imperative reasons of security’, then the detention could be labelled as legal.¹³⁹ The Supreme Court held that there was no breach while he was waiting to be transferred to Afghan authorities from 4 May – 25 July¹⁴⁰ because during this time he was being held for ‘imperative reasons of security’ as well as for logistical reasons.

The UK had to pay compensation so far as the duration of the detention (including any detention pursuant to his conviction by court in Afghanistan) was prolonged by his detention for intelligence purposes.¹⁴¹ Doubts were expressed as to whether any overall detriment had been suffered because he would have been transferred and detained to the Afghan authorities after the initial 96 hours, and this would impact reward of damages.¹⁴² It is worth mentioning the decision on the conditions of detention. There was a breach of the procedural obligation under article 5(4) as there was ‘insufficient institutional guarantees of impartiality’ because the reviewing authority was not independent of those responsible for authorising the detention under review¹⁴³ and there was no participation of the detainee in the review process.¹⁴⁴ Lord Mance in the Supreme Court did not agree there was a breach of article 5(4) because he believed that his participation would not have made a difference to his detention.

UNSCR authorisation: ‘necessary for imperative reasons of security’

The Supreme Court found that the relevant UNSCRs authorised detention beyond the 96 hour period using the wording that the Member States were authorised to do what was ‘necessary for imperative reasons of security’.¹⁴⁵ Lord Sumption stated that the UNSCRs¹⁴⁶ ‘could constitute an authority binding in international law to do that which would otherwise be illegal in international law’¹⁴⁷ even if authorisation to breach international obligations was only implicit rather than explicit.¹⁴⁸ The authorisation given to troop-contributing states in Afghanistan by UNSCR to use ‘all necessary measures’ included detention of members of the opposing armed forces when this

¹³⁹ *Mohammed II* (n 4) paras 86-89 per Lord Sumption; para 198 per Lord Mance.

¹⁴⁰ *Ibid* para 76 per Lord Sumption (with whom Hale agrees); para 144 per Lord Wilson.

¹⁴¹ *Ibid* para 110 per Lord Sumption.

¹⁴² *Ibid* para 193 per Lord Mance.

¹⁴³ *Ibid* para 105 per Lord Sumption.

¹⁴⁴ *Ibid* para 106 per Lord Sumption. This is following the High Court and Court of Appeal decision; Lord Mance in the Supreme Court did not agree there was a breach of article 5(4) because he believed that his participation would not have made a difference to his detention.

¹⁴⁵ Lord Reed dissenting, with whom Lord Kerr agreed, stated that the continued detention beyond 96 hours for intelligence purposes was illegal. However, he noted that there would be no legal basis under UNSCR or LOAC for detention beyond 96 hours if he had been detained for imperative reasons of security (para 235).

¹⁴⁶ UNSCR 1386 (2011), 1510 (2003), 1890 (2009)

¹⁴⁷ *Mohammed II* (n 4) Para 25.

¹⁴⁸ para 27.

was required for imperative reasons of security, even if the detention was contrary to human rights or the laws of armed conflict.¹⁴⁹ This was because of the *jus cogens* nature of UNSCRs.¹⁵⁰ Lord Sumption stated that it would be impractical if a regional human right system required certain Member States of a multi-national force to adopt a detention policy that was distinct from the ISAF policy,¹⁵¹ without acknowledging that it was the UK's departure from the multinational agreement embodied in the ISAF policy that was so contentious. Lord

Lord Sumption relied upon the House of Lords *Al Jedda* decision as authority for the position that UNSCRs could trump human rights.¹⁵² *Al Jedda* was detained for 3 years with no charge or trial. The US Secretary of State Mr Powell had adjoined a letter to UNSCR 1546 (2003) expressly authorising internment in Iraq in the interests of what was necessary for the maintenance and security of the region. What was at issue was whether this was a mere power rather than an obligation imposed by the UNSC to intern and then whether the UNSCR trumped the human rights position prohibiting internment. The House of Lords found that the UNSCR had peremptory force under Article 103 UN Charter, and was thereby an obligation which trumped the ECHR.¹⁵³ The ECtHR did not agree with the House of Lords decision. It found that 'in the event of any ambiguity in the terms of a [UNSCR], the court must...choose the interpretation which is most in harmony with the requirements of the Convention': 'clear and explicit language' is required if the UNSCR intends states to take particular measures which would conflict with their obligations under the ECHR.¹⁵⁴ In the application of this principle to the facts of the case, the ECtHR did not think that Mr Powell's letter provided clear enough authority for the proposition that states should intern. Instead they found that it was merely one of the 'broad range of tasks' that could be undertaken, and that the 'terminology appears to leave the choice of the means to achieve this end to the Member States within [MNF]'¹⁵⁵

Justice Leggatt in the High Court had recognised that he was bound by the House of Lords *Al Jedda* decision rather than the ECtHR's approach, unless and until the Supreme Court departed from that decision. But he felt that the interpretation given by the House of Lords to UNSCR 1546 did not oblige him to read UNSCR 1890 relating to Afghanistan in the same way as the former UNSCR had a letter attached explicitly condoning internment whereas the latter did not.¹⁵⁶ He found that the UNSCR did provide authority for the detention up to 96 hours upon which ISAF had an agreed policy, but not beyond. Taking into account the principles developed in the ECtHR's *Al Jedda* decision, he concluded that there was nothing in the language of UNSCR 1890 that demonstrated an intention to require or authorise detention contrary to human rights. For him, human rights condoned the detention for up to 96 hours for the purpose of bringing him before a competent judge. But not beyond. The Court of Appeal concludes that the UK is acting outside UNSCR 1890, that the detention beyond 96 hours cannot be attributed to the UN, and that therefore the detention beyond 96 hours is attributable to the UK and within the jurisdiction of the courts to examine.

The reliance on an ambiguously worded UNSCR as the legal basis of detention in the first 96 hour period is unfortunate throughout the *Serdar Mohammed* litigation. Finding that the first 96 hours were compliant with article 5(1)(c) and referring to the ISAF policy as an indication of an intent of good will, would not have been enough to secure the legality of the detention in the first 96 hours because it is unlikely that the ISAF policy would have provided the requisite legal basis for

¹⁴⁹ Ibid para 28.

¹⁵⁰ Ibid para 24 citing *Bebrami v France; Saramati v France, Germany and Norway* (2007) 45 EHRR paras 148-149.

¹⁵¹ *Mohammed II* (n 4) para 41.

¹⁵² Ibid para 20 Lord Sumption.

¹⁵³ *Al Jedda No 2* (n 8)

¹⁵⁴ *Al Jedda v UK* (2011) 35 EHRR 23 para 102.

¹⁵⁵ Ibid.

¹⁵⁶ *Mohammed HC* (n 9) paras 213-217.

the detention in the absence of its grounding in the peremptory force of the UNSCR, but Afghan law, allowing 72 hours detention, might have enabled a first period of detention to be legal. Justice Leggatt obviously did not want to conclude that the entire detention was illegal and wanted to provide an indication of circumstances of where terrorist suspects could be detained legally in Afghanistan. As Justice Leggatt remarked himself, the House of Lords *Al Jeddah* decision need never have been significant because he could have simply found that there was no conflict between the UNSCR and human rights. The truth of the matter was that internment without a derogation and without a legal basis under the ECHR was illegal. The UK authorities should have put in place legislation that they would intern for a certain justified period as was done in the Northern Irish context¹⁵⁷ according to the policy some democratic legitimacy, although with a democratic deficit arising in relation to the lack of agreement and participation in the law-making process of other participating member states and the Afghan authorities.

Reliance on the UNSCR as a legal basis for some of the detention in the first period opened the door to a much broader interpretation of the UNSCR in the Court of Appeal and Supreme Court litigation. If we consider Perreau-Saussine's analogy between act of state and UNSCRs as an authority for Member States to have discretion in their actions against foreigners we can understand the problems with placing so much power in ambiguously worded UNSCRs:

On this account, the Security Council can authorise the exercise of autocratic acts of state, constrained only by its self-understanding of the laws of war. In effect this treats the [UNSC] as a foreign sovereign whose acts of state fall outside the jurisdiction of British courts'.¹⁵⁸

The qualification is worthy of Kafka: here a right to be free from internment is trumped by an obligation to intern.

The End of a Right to Liberty?

In the end the majority conclude that UNSCRs trump human rights norms but also that article 5 can accommodate the rights-violating UNSCR. In other words, article 5 has been emptied of its protective force. The executive can point to an ambiguously worded UNSCR as authorisation for indefinite detention in a NIAC.

The Supreme Court found that *Hassan v UK* was authority for the proposition that article 5 ECHR can be interpreted so as to accommodate an international law power of detention which is not among the permissible occasions for detention listed in article 5(1).¹⁵⁹ The Court of Appeal had stated that, by parity of reasoning with *Hassan*, 'if detention under the Geneva Conventions in an IAC can be a ground for detention that is compatible with Article 5 ECHR, it is difficult to see why detention under the UN Charter and UNSCRs cannot also be a ground that is compatible with Article 5'¹⁶⁰ thus providing a misguided forerunner for the Supreme Court decision. But in the latter judgment they did not conclude that the UNSCR had authorised detention. The ECtHR would not authorise article 5 to accommodate indefinite detention. *Hassan* is not authority for this position. ECtHR on jurisprudence both before and after *Hassan* indicate that the ECtHR follows the position adopted in its *Al Jeddah* decision: that UNSCRs will be interpreted to be in conformity with human rights unless 'clear and explicit' language provides otherwise.¹⁶¹ The act of state doctrine resonates through this aspect of the decision – emptying article 5 ECHR of its content in relation to the treatment by Member States of foreigners (but going arguably further than the

¹⁵⁷ *Mohammed II* (n 4) per Lord Reed para 255.

¹⁵⁸ Perreau-Saussine (n 7) 215.

¹⁵⁹ *Mohammed II* (n 4) para 60.

¹⁶⁰ *Mohammed CA* (n 11) 162-163.

¹⁶¹ *Nada v Switzerland* (2012) 56 EHRR 18; *Al Dulimi v Switzerland* [2012] ECHR 1638. This is reiterated by Lord Reed in his dissenting judgment.

original conception of act of state and extending to nationals) situated in a territory. It is hoped that the ECtHR has an opportunity to confirm that Hassan is not authority for the proposition that article 5 can accommodate otherwise rights-violating UNSCRs.

Concluding Remarks

One may argue that the introduction of the act of state doctrine merely as a defence to a private claim but not a block to the public claim is a reasonable outcome of limited significance because it will not have practical ramifications on the ability of the complainant to successfully claim a remedy under the HRA, albeit that the applicant may not be awarded as much in damages under the HRA as in tort law.¹⁶² However, the judgments are collectively significant on a number of levels and have a number of negative ramifications on rights protection.

First, if the private law claim denotes a practice as non-justiciable whereas the public law claim treats it as justiciable, a disparity in outcome and reasoning between private and public law claims can provide confusion about what is or should be permissible behaviour by the state which is contrary to the rule of law.¹⁶³ The rule of law requires the provision of clear and consistent rules, providing stability, foreseeability and a frame one can point to in holding governing powers accountable.¹⁶⁴ The confusion is exacerbated by conceptualising act of state as a principle of non-justiciability in detention cases, rather than a defence in tort, but nevertheless confining its adoption to the private law action.

Second, act of state leaves no protection to extraterritorial applicants in the common law which is concerning because of the precariousness of the HRA, and particularly the extraterritorial application of the HRA in the UK. While at present the claimant is still entitled to protection under the HRA,¹⁶⁵ the extraterritorial application of the HRA is contested. The government at the time of writing has expressed its intention to ensure vexatious claims against the armed forces for their actions abroad are prevented.¹⁶⁶ In these circumstances, the common law will be resorted to in determining what civil claims can be brought. Act of state, whether conceptualised as a defence in tort or a principle of non-justiciability will leave the claimant with no action for extraterritorial alleged killings or detention under this Supreme Court ruling. Act of state will come to the fore as a decisive principle for defining the jurisdiction of the courts to review extraterritorial executive conduct in the absence of the extraterritorial application of the HRA.

International judicial attention has been placed on the armed conflicts in both Iraq and Afghanistan by the International Criminal Court (ICC). The ICC Pre-Trial Chamber II unanimously rejected the request of the Prosecutor to proceed with an investigation into alleged war crimes and crimes against humanity committed in the context of the armed conflict in Afghanistan concerning allegations brought against the US.¹⁶⁷ However, on 5th March 2020, the Appeals Chamber of the ICC decided unanimously to authorise the investigation.¹⁶⁸

In the Report on Preliminary Examination Activities, the Office of the Prosecutor calls to light allegations against the UK that from 20 March 2003 through 28 July 2009 UK servicemen

¹⁶² See e.g. *Alseran* (n 81) per Leggatt J, para 836.

¹⁶³ Wright (n 76) 14.

¹⁶⁴ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP, 2009) 210.

¹⁶⁵ See e.g. Campbell McLachlan, 'The foreign relations power in the Supreme Court (2018) 134 (Jul) LQR who argues that the balance between the lack of remedy in the tort claim and the ability to claim under the HRA is a good position.

¹⁶⁶ Get Brexit Done: Unleash Britain's Potential (The Conservative and Unionist Manifesto 2019) 52 available at <https://vote.conservatives.com/our-plan> last accessed 23rd January 2020.

¹⁶⁷ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* ICC-02/17-33, 12 April 2019, Pre-Trial Chamber II.

¹⁶⁸ *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan* ICC-02/17 OA4, 5 March 2020, Appeals Chamber.

committed war crimes against persons in their custody in the context of armed conflicts in Iraq including wilful killing/murder.¹⁶⁹ The Report assesses whether there is evidence to suggest the UK is unwilling and unable to investigate alleged crimes in conformity with the principle of complementarity. The office considered investigative journalism that brought to light alleged attempts to shield the conduct of British troops in Iraq and Afghanistan from criminal accountability.¹⁷⁰ It further noted the intent by the UK government to create a statutory presumption against prosecution of personnel for alleged offences committed outside the UK more than 10 years previously, and which have been the subject of a previous investigation,¹⁷¹ which would include investigations in Afghanistan, Iraq, and Northern Ireland. The invocation of the act of state doctrine, and parallel expansive reading of UNSCRs, is in effect the court's retreat from judicial scrutiny of these conflicts, except in cases of alleged inhumane treatment or torture. This could be construed as an additional indicator that UK institutions are unwilling and unable to detect, scrutinise, and hold relevant personnel responsible, for systemic rights violations in overseas conflicts, especially in vulnerable states hosting proxy wars between multinational non-state actors. Act of state is a white flag in the battlefield of judicial warfare: the courts will not operate under the assumption that executive action against those harmed extraterritorially is justiciable. The HRA decision reinforces this element of surrender by the courts to executive decisions.

Empire is alive and well, act of state is one vehicle through which it is manifested. But it is the colonial mindset, characterised by an ambivalence towards the extraterritorial, which is the legacy of empire.

¹⁶⁹ Article 8(2)(a)(i)) or article 8(2)(c)(i)); as well as torture and inhuman/cruel treatment, and outrages upon personal dignity (article 8(2)(b)(xxi) or article 8(2)(c)(ii)).

¹⁷⁰ The Office of the Prosecutor, 'Report on Preliminary Examination Activities 2019' (International Criminal Court 5 December 2019) para 170, available at <<https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>> last accessed 15th June 2020.

¹⁷¹ Ibid para 173.